COURT OF APPEALS DECISION DATED AND FILED

January 26, 2010

David R. Schanker Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP956-CR STATE OF WISCONSIN

Cir. Ct. No. 2007CF4362

IN COURT OF APPEALS DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONOVAN M. BURRIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: WILLIAM SOSNAY AND DENNIS R. CIMPL, Judges. *Affirmed in part, reversed in part and cause remanded.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 KESSLER, J. Donovan M. Burris appeals from a judgment of conviction for first-degree reckless injury while armed and being a felon in possession of a firearm, contrary to WIS. STAT. §§ 940.23(1)(a), 939.63 and

941.29(2)(a) (2007-08), and from an order denying his motion for postconviction relief.² Although Burris appealed from his entire judgment of conviction, he presents no argument concerning his conviction for being a felon in possession of a firearm.³ Therefore, we affirm that conviction. See State v. Johnson, 184 Wis. 2d 324, 344, 516 N.W.2d 463 (Ct. App. 1994) ("On appeal, issues raised but not briefed or argued are deemed abandoned."). With respect to his conviction for first-degree reckless injury, Burris offers four arguments in support of his request that we reverse his conviction and remand for a new trial: (1) the trial court erroneously answered the jury's question concerning whether after-the-shooting conduct could be considered in a manner which misled the jury; (2) the trial court erred when it allowed the State to cross-examine Burris on an irrelevant issue and then also allowed the State to present rebuttal evidence on that issue; (3) trial counsel provided ineffective assistance in several respects; and (4) a new trial is warranted in the interest of justice. We conclude that Burris is entitled to a new trial based on his first argument and, therefore, we do not consider the other issues. See State v. Blalock, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) ("[C]ases should be decided on the narrowest possible ground."). We reverse Burris's conviction for first-degree reckless injury and remand for further proceedings.

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

² The Honorable William Sosnay presided over the trial and sentenced Burris. The Honorable Dennis R. Cimpl denied Burris's motion for postconviction relief.

³ At trial, it was stipulated that Burris was a felon and was prohibited from possessing a firearm, and Burris testified at length about how he brought the gun to the scene and was holding it when the bullet was fired, causing injury to the victim.

BACKGROUND

Burris is the father of two children who live with their mother, Burris's ex-girlfriend, Khadijah Rashada.⁴ The events relevant to this appeal occurred at the home of Khadijah's mother, Cathy Rashada. On September 5, 2007, Khadijah, her two children, Cathy and Cathy's adult son, Kamal Rashada (a/k/a "Mello"), were at their home. It is undisputed that Burris came to the home with a gun and spoke with Khadijah. An argument ensued. Ultimately, Burris fired a single shot from his gun and Kamal was hit in the neck, paralyzing him. Immediately after the shooting, Burris appeared to express remorse for the act, which, according to the State, was the reason he was not charged with a more serious felony.

¶3 Burris was charged with first-degree recklessly causing bodily injury while armed and being a felon in possession of a firearm. The case proceeded to trial.

¶4 At trial, the issue with respect to the shooting was whether Burris was guilty of: (1) first-degree recklessly causing bodily injury, which requires that Burris recklessly caused great bodily harm "under circumstances which show utter disregard for human life," *see* WIS. STAT. § 940.23(1)(a); (2) second-degree recklessly causing bodily injury, which requires only that Burris recklessly caused

⁴ Because we discuss three people with the last name Rashada, we will refer to those persons by their first names.

⁵ The name "Mello" is spelled at least two different ways in the transcript. For purposes of this opinion, we will use the spelling Mello.

great bodily harm, *see* § 940.23(2)(a); or (3) neither, pursuant to the defense's theory that Burris's conduct was not criminally reckless.

- ¶5 Khadijah testified that Burris unexpectedly came to Cathy's home a little before 3:00 p.m. Khadijah was in the bathroom bathing her children. Khadijah said Burris entered the bathroom and the two spoke about Burris providing diapers for the children. Khadijah said that at one point, she told Burris that she was going to move away from Milwaukee. Khadijah testified that Burris got upset and began to call Khadijah names. Khadijah said the two argued for about five minutes and then her mother came and got her. Khadijah and her children went to the living room, as did Burris.
- ¶6 Khadijah said the argument continued and that Burris eventually "pulled out a pistol" from his waistband. Khadijah testified that Burris aimed the gun at her and said, "Bitch, I kill you." She continued: "And that's when he was coming towards me with the gun, that's when my brother [Kamal] came out [of] the room and opened the [front] door and tried to tell [Burris] to get out." Khadijah said that Kamal told Burris to leave and that Burris's reaction was to say no and swear. Khadijah said Burris, who had the gun in his hand, raised it and then, with the muzzle of the gun close to Kamal's neck, pulled the trigger, striking Kamal in the neck.
- ¶7 Khadijah said that after the gun fired Kamal fell to the ground and Burris said to Kamal: "Mello, Mello, don't die. I didn't mean to do it. Don't die." Khadijah testified that Burris then aimed the gun at his own head and told Cathy to kill him, stating: "Cathy, I didn't mean to do it. Kill me. I didn't mean to do it." Khadijah said that Cathy did not touch the gun and that after about ten seconds, Burris ran out of the home.

- ¶8 On cross-examination, the defense attempted to impeach Khadijah by asking her questions about what she told law enforcement the day of the shooting. Khadijah said that the investigating detective's report was wrong when it said Khadijah told the detective that Burris held the gun at his side the whole time, rather than pointing it at Khadijah. She also denied stating that Kamal had grabbed Burris by the wrist before the gun fired, asserting instead that Kamal "barely touched" Burris.
- ¶9 Kamal also testified about the events of September 5. He said he was sleeping and woke up when he heard arguing between Khadijah and Burris. Kamal said he did not get involved at first, but then he went to the living room and asked Burris to leave. Kamal said Burris refused and continued to argue with Khadijah about a new boyfriend. Kamal said he tapped Burris "on the side" to ask him to step outside through the open front door.
- ¶10 Kamal testified that at the time he tapped Burris, Burris had the gun down by his side. Kamal said after he tapped Burris, Burris "turned around, pointed" the gun at Kamal's neck, called Kamal "the 'N' word" and then fired the gun at Kamal's neck, which was six to eight inches away from the gun.
- ¶11 Kamal said that after the shot was fired, Burris starting calling him by his nickname, Mello, and tried to determine if Kamal was alright. Kamal said Burris "told either my mother or my sister to shoot him" and offered the gun to Khadijah, who did not take it. Kamal said that Burris did not say he was sorry to Kamal and left the home after about one minute.
- ¶12 Like Khadijah, Kamal was cross-examined about inconsistencies in his testimony and statements the officers claimed Kamal gave them on the day of the shooting. For instance, Kamal was asked if he remembered telling officers

that he pushed Burris "out the door, and [Burris] reached around the door and fired the shot" at Kamal. Kamal said he did not remember telling the officer that information, and that the information was inaccurate.

¶13 Cathy testified that she was in the living room when she heard Khadijah and Burris arguing in the bedroom. She said she "went and pulled" Khadijah out of the room and into the living room after Cathy heard Burris say he was going to "pistol whip" Khadijah. She said Burris came into the living room with a gun in his hand and was waving it around, saying he was going to pistol whip Khadijah. Cathy said she told Burris to leave and he told her "he wasn't going anywhere." She testified about what led to the gunshot:

My son came out [of] the [bed]room and went by the [front] door and asked [Burris] to leave, and he touched [Burris's] arm, asked him to leave, and then he asked him again. That's when [Burris] just put a gun to his neck and shot.

. . . .

[After the gun was fired Burris] tried to give me the gun, told me to shoot and kill him.

. . . .

... [Burris] said he didn't mean to shoot Kamal.

Cathy said that Burris was upset and seemed "[o]ut of his head."

¶14 Burris testified in his own defense. He said he went to Khadijah's home so that he could visit his children. He acknowledged that he brought a gun to the home, explaining that his life had been threatened by some people who live in the area, so he took the gun with him to Khadijah's home for protection. Burris said that before he spoke with Khadijah, he proceeded to a bedroom and put the

gun under a mattress for safekeeping, which he said was his usual procedure when he visited the home.

¶15 Burris said he and Khadijah had a fight about diapers and whether her new boyfriend would provide them. He said they argued in the bedroom, where they "exchanged obscenities back and forth" and that Khadijah said her new boyfriend would kill Burris. Burris said Cathy "came to the back room, told me to leave and she escorted Khadijah to the living room." At that point, Burris said, he retrieved his gun and went to the living room, intending to put it back in his pants, although he never did, as he "was advancing toward the [front] door." He said he kept the gun pointed down and never pointed it at Khadijah or threatened to shoot or "pistol whip" her.

¶16 Burris said as he continued to argue with Khadijah in the living room,

out of my peripheral sight, Kamal is advancing towards me at a rapid speed. By the time I looked to see what he was doing, he was reaching for my wrist.

. . . .

Well, upon him reaching for my wrist, I didn't want no one to gain possession of this pistol. I wanted to keep control of this gun. I didn't know what his intentions were, so I turned and snatched away [sic].

Burris testified that he pulled his arm from Kamal's grasp and, as he did so, "the pressure from my hand hit[] the trigger and it discharge[d] a bullet." Burris said after the gunshot, he looked to see where the bullet went and then saw Kamal "fall to his knees holding his face." Burris testified:

[W]hen I [saw] him holding his face, I thought that I shot him in the head area. So I then put my gun to my head and threatened to kill myself.

....

I told his mother to shoot me.

....

... I was distraught.... [I]t was irrational thinking. I was discombobulated completely. I didn't know what to think.

•••

... [I]t was a freak accident.

Burris said that Kamal asked Burris if he would live and Burris looked at the wound and saw a pink slit that led Burris to assume the injury "wasn't that major." Burris said he then fled the scene.

¶17 The trial court gave the jury standard jury instructions, including instructions for first-degree reckless injury and the lesser-included crime of second-degree reckless injury.⁶ The trial court's instruction for first-degree reckless injury, which was nearly identical to WIS JI—CRIMINAL 924A⁷ (concerning the circumstances that show utter disregard for human life), was as follows:

In determining whether the conduct showed utter disregard for human life, you should consider these factors: What the

In determining whether the conduct showed utter disregard for human life, you should consider all the factors relating to the conduct. These include the following: what the defendant was doing; why he was doing it; how dangerous the conduct was; how obvious the danger was; and whether the conduct showed any regard for human life.

⁶ The sole distinction between first- and second-degree reckless injury is that first-degree conduct requires the commission of a crime "under circumstances which show utter disregard for human life." *See* WIS. STAT. § 940.23(1)(a) & (2)(a).

⁷ WISCONSIN JI—CRIMINAL 924A provides:

defendant was doing, why the defendant was engaged in that conduct, how dangerous the conduct was, how obvious the danger was, whether the conduct showed any regard for life and all other facts and circumstances relating to the conduct.

¶18 The jury began its deliberations. Subsequently, the jury submitted a written question to the trial court that stated: "Regarding the element of utter disregard, all other facts and circumstances relating to the incident, do we consider facts and circumstances after the shooting?" The trial court proposed to the parties that it read the following language from *State v. Jensen*, 2000 WI 84, ¶32, 236 Wis. 2d 521, 613 N.W.2d 170:

After-the-fact regard for human life does not negate "utter disregard" otherwise established by the circumstances before and during the crime. It may be considered by the factfinder as a part of the total factual picture, but it does not operate to preclude a finding of utter disregard for human life.

The trial court also proposed instructing the jury using another passage from *Jensen*: "[T]he element of utter disregard for human life is measured objectively, on the basis of what a reasonable person in the defendant's position would have known." *See id.*, ¶17.

- ¶19 The State agreed with the trial court's suggested answer. Trial counsel disagreed, noting that "neither side asked for any special jury instructions" and suggesting that the trial court "just charge the jury to go over those jury instructions again and use their collective intelligence and common sense in interpreting what they see."
- ¶20 The trial court decided to read the instruction it had proposed, explaining that given the jury's question, it was appropriate to respond with the language from *Jensen* because it "addresses this specifically." Burris personally

objected to this decision, questioning the use of the *Jensen* language. The trial court was not persuaded.

¶21 As the trial court was preparing for the jury to return so that it could answer its first question, the jury provided another question in writing that stated: "Should we consider facts and circumstances after the shooting in determining utter disregard?" The trial court recognized that the second question was similar to the first question and said it would give the answer it previously planned to give.

¶22 The trial court instructed the jury as follows:

First of all, I want to emphasize that you are to rely on the instructions that I gave you. All right? And to rely on all of the instructions that I gave you.

And in response to this question, if this clarifies anything, after-the-fact regard for human life does not negate utter disregard otherwise established by the circumstances before and during the crime. It may be considered by the fact-finder as a part of the total factual picture, but it does not operate to preclude a finding of utter disregard for human life. The element of utter disregard for human life is measured objectively on the basis of what a reasonable person in the defendant's position would have known.

¶23 Ultimately, the jury returned a guilty verdict on the charge of first-degree reckless injury and, accordingly, did not answer the verdict form concerning second-degree reckless injury. It also found Burris guilty of being a felon in possession of a firearm. Burris was sentenced to fifteen years of initial confinement and five years of extended supervision for injuring Kamal, and three

⁸ The foreperson explained to the trial court that the second question was the same as the first, but was asked "more directly."

years of initial confinement and two years of extended supervision for being a felon in possession of a firearm, to be served consecutively.

¶24 Burris filed a motion for postconviction relief alleging numerous grounds for relief. As relevant to the issue we address on appeal, Burris argued that the trial court erred when it chose to read the *Jensen* language in response to the jury's questions, for reasons we discuss in greater detail below. The trial court denied Burris's motion for postconviction relief without a hearing. This appeal follows.

DISCUSSION

¶25 The dispositive issue in this case concerns the trial court's instructions to the jury that were offered in response to two jury questions. A trial court "has broad discretion in deciding whether to give a particular jury instruction." *State v. Ferguson*, 2009 WI 50, ¶9, 317 Wis. 2d 586, 767 N.W.2d 187 (citation omitted). A trial court "properly exercises its discretion when it fully and fairly informs the jury of the law that applies to the charges for which a defendant is tried." *Id.* "Whether a jury instruction fully and fairly informs the jury of the law applicable to the charges being tried is a question of law that we review independently." *Id.* "Only if the jury instructions, as a whole, misled the jury or communicated an incorrect statement of law will we reverse and order a new trial." *State v. Laxton*, 2002 WI 82, ¶29, 254 Wis. 2d 185, 647 N.W.2d 784.

¶26 The legal analysis applied to determine whether a defendant is entitled to a new trial based on a challenged jury instruction varies based on whether the defendant has challenged the accuracy of the instruction or has asserted that the instruction, while legally accurate, misled the jury. Specifically, harmless error analysis is used if a party alleges the instruction was an "erroneous

legal statement." See State v. Lohmeier, 205 Wis. 2d 183, 192, 556 N.W.2d 90 (1996).

¶27 In contrast, *Lohmeier* held "that the proper standard for Wisconsin courts to apply when a defendant contends that the interplay of legally correct instructions impermissibly misled the jury is whether there is a reasonable likelihood that the jury applied the challenged instructions in a manner that violates the constitution." *Id.* at 193. *Lohmeier* continued:

Wisconsin courts should not reverse a conviction simply because the jury possibly could have been misled; rather, a new trial should be ordered only if there is a reasonable likelihood that the jury was misled and therefore applied potentially confusing instructions in an unconstitutional manner. Furthermore, in making this determination, appellate courts should view the jury instructions in light of the proceedings as a whole, instead of viewing a single instruction in artificial isolation.

Id. at 193-94.

¶28 In this case, Burris and the State agree that the correct answer to the jury's question—whether the jury could consider facts and circumstances after the shooting in determining whether Burris's conduct showed utter disregard—was yes. We agree. *Jensen* acknowledged that a factfinder can consider after-the-fact regard for human life in determining whether a defendant showed utter disregard. *See id.*, 236 Wis. 2d 521, ¶32; *see also State v. Miller*, 2009 WI App 111, ¶35 n.12, ___ Wis. 2d ___, 772 N.W.2d 188 (rejecting suggestion "that evidence of 'after-the-fact' regard for life is of less import than conduct evincing regard for life during and before the act" because "[c]ourts consider the totality of the circumstances when determining whether the defendant showed some regard for life, which may include conduct occurring before, during and after the commission of the criminally reckless act itself").

¶29 The State contends that because the trial court accurately quoted *Jensen* when it answered the jury's question, and therefore correctly stated the law, there was no error. In contrast, Burris asserts that the trial court's answer to the jury should have simply been "yes," and that the answer the trial court chose to give instead misled the jury, even though the instruction was an accurate statement of the law. Burris explains:

[T]he point is not that the trial court's answer was an incorrect statement of the law in the abstract; rather, the point is that—in the specific context in which it was provided, as a response to the jury's question about whether it could consider after-the-fact conduct—the answer was misleading because it implied that the jury should not consider after-the-fact regard at all, or at least not consider it equally with other circumstances.

Burris asserts that language used by the trial court in answering the jury's question evidenced a "negative response suggesting that the jury should not consider after-the-fact conduct." Burris directs our attention to two phrases in the answer used by the trial court: "after-the-fact regard for human life *does not* negate utter disregard" and "it *does not* operate to preclude a finding" of utter disregard. He argues that "[t]he most likely interpretation of this negative language was that the jury should not consider after-the-fact conduct."

¶30 Burris also contends that the trial court's "answer was confusing because it did not fit the question the jury asked." Burris states:

The passage was legally accurate for the particular issue and facts of *Jensen*, but it was not applicable to the jury's

question here.[9] The jury here was not determining the legal sufficiency of the evidence; rather, the jury was asking whether it *could consider* after-the-fact conduct at all. The language from *Jensen*—accurate for the context in which it was written—was non-responsive to the particular question the jury asked, and therefore reading that language was confusing and misleading.

¶31 Burris's argument for a new trial is based on his assertion that the jury was misled. Therefore, in deciding whether a new trial should be ordered, we must consider whether "there is a reasonable likelihood that the jury was misled and therefore applied potentially confusing instructions in an unconstitutional manner." *See Lohmeier*, 205 Wis. 2d at 194. We conclude that this standard has been met and, therefore, we reverse and remand for a new trial on first-degree reckless injury.

¶32 We are convinced there is a reasonable likelihood that the trial court's answer, offered in response to the jury's specific question, misled the jury. The jury simply asked whether it could consider after-the-fact conduct in determining whether there was utter disregard for human life. The answer to that question is yes. Arguably, that answer was communicated when the trial court

After-the-fact regard for human life does not negate "utter disregard" otherwise established by the circumstances before and during the crime. It may be considered by the factfinder as a part of the total factual picture, but it does not operate to preclude a finding of utter disregard for human life.

Id., ¶32.

⁹ State v. Jensen, 2000 WI 84, 236 Wis. 2d 521, 613 N.W.2d 170, involved an appeal from a conviction for first-degree reckless injury. *Id.*, ¶1. Jensen, who admitted he vigorously shook his ten-week-old son, thereby causing him permanent injury, argued that he was guilty only of second-degree reckless injury because the State did not prove he acted with utter disregard for human life. *Id.* The court rejected Jensen's argument that his after-the-shaking call to 911 precluded a finding of utter disregard, stating:

told the jury that "[a]fter-the-fact conduct for human life ... may be considered by the factfinder as part of the total factual picture." The problem is that the trial court's answer also included language that was used in *Jensen* to reject the defendant's argument that demonstrating after-the-fact regard for human life *precludes* a finding of utter disregard. When the *Jensen* language was read to the jury in answer to the question whether they could even *consider* after-the-fact actions, there is a reasonable likelihood that the jury interpreted the answer as suggesting that the trial court was implying that Burris's after-the-fact conduct was not important or compelling, that it should not be considered equally with other circumstances or that no amount of after-the-fact regard for human life could negate early behavior suggesting disregard for human life. Those interpretations of the trial court's answer would be incorrect. The trial court was not intending to suggest that Burris's display of remorse was not compelling or worthy of lesser consideration, and a jury *can* consider after-the-fact conduct in determining whether utter disregard for human life was demonstrated in the first place.

¶33 For these reasons, we conclude that "there is a reasonable likelihood that the jury was misled and therefore applied potentially confusing instructions in an unconstitutional manner." *See Lohmeier*, 205 Wis. 2d at 194. Therefore, we

The State argues that the intent of the trial court's instruction "was to caution the jury that, while it should consider the later conduct in the totality of the circumstances, it should not give it undue emphasis." We are not convinced that was the trial court's intent because there was no discussion at the jury instruction conference about concerns that the jury would give the conduct undue emphasis. Moreover, if that was the trial court's intent, we question whether there was a need to caution the jury about undue emphasis. As Burris points out, "nothing in the jury's question[s] remotely suggests that the jury was likely to [believe that after-the fact conduct erases all other circumstances]—the jury asked whether it could consider after-the-fact conduct, not whether such conduct should overwhelm the other circumstances."

reverse Burris's conviction for first-degree reckless injury and remand for further proceedings on that charge.

By the Court.—Judgment and order affirmed in part, reversed in part and cause remanded.

Not recommended for publication in the official reports.

No. 2009AP956-CR(D)

- ¶34 FINE, J. (*dissenting*). I respectfully disagree with the Majority's conclusion that the trial court's supplemental instruction was error.
- ¶35 As the Majority notes, "The jury simply asked whether it could consider after-the-fact conduct in determining whether there was utter disregard for human life. The answer to that question is yes." Majority at ¶32. Yet, as the Majority concedes, the trial court told the jury that after-the-fact conduct could be considered. *Ibid*. Thus, as the Majority recounts: "Arguably, that answer was communicated when the trial court told the jury that "[a]fter-the-fact conduct for human life ... may be considered by the factfinder as part of the total factual picture." *Ibid*. Yet, the Majority asserts that the following part of what the trial court told the jury was error:

And in response to this question, if this clarifies anything, after-the-fact regard for human life does not negate utter disregard otherwise established by the circumstances before and during the crime. It may be considered by the fact-finder as a part of the total factual picture, but it does not operate to preclude a finding of utter disregard for human life.

Majority at ¶¶22, 28–33. I respectfully disagree.

¶36 Distilled to its elements, the trial court told the jury: (1) although after-the-fact conduct *may* be considered, insofar as it may illumine what the defendant was thinking before and during the assault; (2) after-the-fact remorse "does not negate utter disregard otherwise established by the circumstances *before* and during the crime"; and thus after-the-fact remorse "does not operate to *preclude* a finding of utter disregard for human life." (Emphases added.) This is a

wholly accurate statement of the law in Wisconsin. Indeed, *State v. Jensen*, 2000 WI 84, ¶32, 236 Wis. 2d 521, 535–536, 613 N.W.2d 170, 177, held as much:

After-the-fact regard for human life does not negate "utter disregard" otherwise established by the circumstances before and during the crime. It may be considered by the factfinder as a part of the total factual picture, but it does not operate to preclude a finding of utter disregard for human life.

¶37 I do not understand how this clear and accurate statement of the law, which, as we have seen, the trial court used in its supplemental instruction, can be held to mislead a jury. I would affirm.